56638

24
BPP

No. 06-1646

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

GINO GONZAGA RODRIQUEZ,

Respondent.

On Writ Of Certiorari to the United States Court Of Appeals For The Ninth Circuit

BRIEF FOR AMICI CURIAE PROFESSORS OF CRIMINAL LAW IN SUPPORT OF RESPONDENT

[Professors Listed On Inside Cover]

SAMUEL ESTREICHER
NYU SCHOOL OF LAW
SUPREME COURT CLINIC
40 Washington Sq. South
New York, NY 10012
(212) 998-6226

MEIR FEDER
Counsel of Record
JONES DAY
222 East 41st St.
New York, NY 10017
Tel: (212) 326-7870

DONALD B. AYER
JONES DAY
51 Louisiana Ave., NW
Washington, D.C.20001
(202) 879-4689

Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

DOUGLAS A. BERMAN
William B. Saxbe Designated Professor of Law
OHIO STATE UNIVERSITY MORITZ COLLEGE OF LAW

MARK W. OSLER
Professor of Law
BAYLOR LAW SCHOOL

MICHAEL M. O'HEAR
Professor of Law
MARQUETTE UNIVERSITY LAW SCHOOL

CARISSA BYRNE HESSICK
Associate Professor of Law
ARIZONA STATE UNIVERSITY SANDRA DAY O'CONNOR COLLEGE OF LAW

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

ARGUMENT 1

POINT I: THERE IS A FUNDAMENTAL CONCEPTUAL FLAW IN DETERMINING THE SERIOUSNESS OF A PARTICULAR DRUG OFFENSE BY REFERENCE TO A RECIDIVISM STATUTE 1

A. Congress In The ACCA Sought To Identify A Specific Category Of Drug *Offenses* The States Deemed Serious. 3

B. State Recidivism Laws Reflect Judgments About Repeat Offenders, Rather Than About The Seriousness Of Underlying Offenses 7

C. Incorporating Recidivism Laws Into The Interpretation Of "Serious Drug Offense" Would Produce Absurd Results And Place Great Burdens On Lower Federal Courts 10

POINT II: TITLE 18 U.S.C. § 924(E)(2)(A)(II) SHOULD BE INTERPRETED IN A MANNER THAT MINIMIZES THE SERIOUS CONSTITUTIONAL CONCERNS RAISED BY JUDICIAL FACT-FINDING REGARDING RECIDIVISM 14

CONCLUSION 17

TABLE OF AUTHORITIES

Page

CASES

Almendarez-Torres v. United States,
523 U.S. 224 (1998) 15

Ansell v. Commonwealth,
250 S.E.2d 760 (Va. 1979) 8, 9

Apprendi v. New Jersey, 530 U.S. 466 (2000) 15

Clark v. Martinez, 543 U.S. 371 (2005) 16

Ewing v. California, 538 U.S. 11 (2003) 8, 9

Jones v. United States, 526 U.S. 227 (1999) 15

Logan v. United States,
No. 06-6911, --- S. Ct. ---, 2007 WL 4232786
(Dec. 4, 2007) 7

Montone v. State, 521 A.2d 720 (Md. 1987) 8

Parke v. Raley, 506 U.S. 20 (1992) 7

Rodriguez v. United States,
480 U.S. 522 (1987) 5

Rangel-Reyes v. United States,
126 S. Ct. 2873 (2006) 15

Rummel v. Estelle, 445 U.S. 263 (1980) 8

Shepard v. United States,
544 U.S. 13 (2005) 15, 16

State v. Conley, 222 N.W.2d 501 (Iowa 1974) 8

State v. Driggs, 745 P.2d 135 (Ariz. 1987) 8

State v. Freeman,
705 N.W.2d 286 (Iowa 2005) 8

TABLE OF AUTHORITIES
(continued)

Page

State v. Pierce, 283 N.W.2d 6 (Neb. 1979), *overruled on other grounds, State v. Ellis*, 333 N.W.2d 391 (Neb. 1983) 8

State v. Wyne, 460 S.E.2d 450 (W. Va. 1995) 8

STATUTES & RULES

Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(A)..... *passim*

S. Ct. R. 37.6..... 1

Conn. Gen. Stat. Ann. § 21a-277(b) 11

D.C. Code § 48-904.08 (2007) 10

Idaho Code Ann. § 37-2732(a) 11

720 Ill. Comp. Stat. Ann. 570/408 (West 2007)..... 10, 11

Ind. Code Ann. § 35-50-2-8 (h)..... 11

Iowa Code Ann. § 124.411(1)..... 11

La. Rev. Stat. Ann. § 40:982 (2007)..... 10

Md. Code Ann., Crim. Law, § 5-905 (West 2007)..... 10

N.J. Stat. Ann. § 24:21-29 (West 2007) 10

S.D. Codified Laws § 22-42-3..... 11

Wash. Rev. Code Ann. § 69.50.408 (West 2007)..... 10

TABLE OF AUTHORITIES
(continued)

Page

LEGISLATIVE HISTORY

S. Rep. No. 99-849 (1986) 7

S. Rep. No. 99-797 (1986) 5

S. Rep. No. 98-506 (1983) 4

S. Rep. No. 97-585 (1982) 4

Hearing on H.R. 4639 and H.R. 4768 Before the Subcomm. on Crime of the House Comm. on the Judiciary, 99th Cong., 2d Sess. (1986) 4, 5, 6

Hearing on H.R. 1627 and S. 52 Before the Subcomm. on Crime of the House Comm. on the Judiciary, 98th Cong., 2d Sess. (1984) 4

MISCELLANEOUS

James A. Ardaiz, *California's Three Strikes Law: History, Expectations, Consequences*, 32 McGEORGE L. REV. 1 (2000) 8, 9

Douglas A. Berman, *Distinguishing Offense Conduct and Offender Characteristics in Modern Sentencing Reforms*, 58 STAN. L. REV. 277 (2005) 2

John Clark, *et al.*, *"Three Strikes and You're Out": A Review of State Legislation*, U.S. Dep't of Justice, Nat'l Inst. of Justice (Sept. 1997) 13

DEPARTMENT OF JUSTICE, STATUTES REQUIRING THE USE OF CRIMINAL HISTORY RECORD INFORMATION (June 1991) 8

TABLE OF AUTHORITIES
(continued)

Page

Ryan King, The Sentencing Project, *Changing Direction? State Sentencing Reforms 2004-2006* (Mar. 2007), *reprinted at* 19 Fed. Sent'g Rep. 253 (2007) 14

Wayne A. Logan, *Civil and Criminal Recidivists: Extraterritoriality in Tort and Crime*, 73 U. CIN. L. REV. 1609 (2005) 7

Wayne A. Logan, *Horizontal Federalism in an Age of Criminal Justice Interconnectedness*, 154 U. PA. L. REV. 257 (2005) 13

Dan Markel, *Connectedness and Its Discontents: The Difficulties of Federalism and Criminal Law*, 4 OHIO ST. J. CRIM. L. 573 (2007) 13

Colleen P. Murphy, *The Use of Prior Convictions After* Apprendi, 37 U.C. DAVIS L. REV. 973 (2004) 16

Martin H. Pritikin, *Punishment, Prisons, and the Bible: Does "Old Testament Justice" Justify Our Retributive Culture?*, 28 CARDOZO L. REV. 715 (2006) 14

STATEMENT OF INTEREST[1]

Amici curiae are professors who teach criminal law courses at law schools in the United States, and as such they have a professional interest in ensuring that federal criminal statutes are interpreted in a manner that coherently advances their purposes and is consistent with relevant constitutional principles. In particular, *amici curiae* submit this brief to highlight the theoretical incoherence of interpreting the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(A), by reference to state recidivism statutes, as well as the undesirability of interpreting the ACCA in a way that expands the constitutionally suspect practice of increasing applicable maximum sentences through judicial factfinding concerning prior criminal convictions.

ARGUMENT

POINT I

THERE IS A FUNDAMENTAL CONCEPTUAL FLAW IN DETERMINING THE SERIOUSNESS OF A PARTICULAR DRUG OFFENSE BY REFERENCE TO A RECIDIVISM STATUTE

This case asks whether Congress intended that the determination whether a particular State drug

---

[1] Pursuant to Rule 37.6, *amici curiae* certify that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amici, or their counsel, made a monetary contribution to its preparation or submission.

Both parties have consented to the filing of this brief.

offense is a "serious drug offense" under the ACCA—defined as one carrying a "maximum term of imprisonment of ten years or more"—should turn on the panoply of State recidivism sentencing rules appearing in various State statutes and guidelines.

Both the language of the ACCA and its legislative history make clear that Congress intended to identify a narrow and specific class of intrinsically serious State drug offenses, *not* merely a broad category of crimes that—for whatever reason—gave rise to sufficiently lengthy potential sentences. Congress's reasons for this narrow focus included a desire to avoid unnecessary federalization of State criminal law as well a concern about imposing the harsh penalties of the ACCA only on the most deserving of serious offenders. These concerns led Congress to enact a statutory text expressly delimiting the ACCA's application to a class of "serious" drug offenses; it then utilized the maximum sentence prescribed by State law for the particular offense as a proxy for assessing a State's judgment as to the seriousness of particular drug offenses.

The Government's proposed incorporation of State recidivism enhancements into this definition suffers from a fundamental incoherence. Recidivism statutes typically reflect views about how to punish recidivism and how to deal with repeat offenders, *not* a State's judgment about the seriousness of particular crimes. *See generally* Douglas A. Berman, *Distinguishing Offense Conduct and Offender Characteristics in Modern Sentencing Reforms*, 58 STAN. L. REV. 277 (2005). Incorporating such statutes into the calculation of the maximum term of imprisonment would therefore confound Congress's effort to specify

only types of drug offenses a State deems particularly serious. Moreover, contrary to the intended function of the ACCA, this approach would sweep many minor prior drug offenses into the ambit of the ACCA and risk undermining the very federalism principles that the ACCA sought to respect.

A. Congress In The ACCA Sought To Identify A Specific Category Of Drug *Offenses* The States Deemed Serious

The addition of "serious drug offense[s]" as predicate crimes under the ACCA was accomplished by the Career Criminals Amendment Act of 1986. That Act aimed to single out a particular class of offenses by a carefully considered reference to State drug offenses "involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance ... for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. § 924(e)(2)(A)(ii). Notably, Congress did not incorporate all drug offenses, or even all drug trafficking offenses, as predicate offenses under the ACCA; rather it sought to identify a subset of the most serious such offenses. Whether a crime would be treated as a "serious drug offense" would therefore be determined by looking at the sentences State legislatures imposed for the particular *offense*. Congress included no reference, in identifying such offenses, to the characteristics or criminal history of the particular *offender*.

This definition was carefully chosen. Serious drug offenses were initially defined in the proposed legislation only by reference to federal law, as

"offense[s] under the Controlled Substances Act or the first section of Public Law 96-350, for which a maximum term of imprisonment of ten years or more is prescribed by law." Hearing on H.R. 4639 and H.R. 4768 Before the Subcomm. on Crime of the House Comm. on the Judiciary, 99th Cong., 2d Sess. 6 (1986) (hereinafter "House Hearing"). In considering how to define serious State drug offenses, Representative Lawrence J. Smith noted the possibility of focusing on the punishment prescribed by the State as a proxy for how serious the State considered the drug offense. *See* id. at 39 ("perhaps [Congress] can use the categories of the punishment which the crime originally called for as a guide"). Congress eventually selected, as that proxy, offenses carrying at least a ten year maximum sentence.

It is well-established, moreover, that the ACCA was shaped by an express desire to have it apply only to a limited category of particularly serious offenses. In enacting the statute, one of Congress's principal concerns was to limit any intrusion upon the traditional state and local prosecutorial function. Congress envisioned ACCA to be a "safety net," with the "central purpose of [seeking] to *supplement* state prosecution," not displace it. S. Rep. No. 97-585, at 8, 65 (1982) (emphasis added). This is plainly expressed in materials from both legislative chambers. *See, e.g.*, S. Rep. No. 98-506, at 2 (1983) (statement of Senator Specter); Hearing on H.R. 1627 and S. 52 Before the Subcomm. on Crime of the House Comm. on the Judiciary, 98th Cong., 2d Sess. 19 (1984). This concern carried over to the 1986 Career Criminals Amendment Act of 1986, where one "major principle[]" that Congress kept in mind

was not to "do any damage to the entire concept of federalism," and as a result to "prioritize" offenses. House Hearing at 11.

Thus, the selection of predicate offenses that would trigger the application of the ACCA was shaped by: (1) a desire not to intrude too far into the primary responsibility of the States for criminal law enforcement, and (2) a concern that the ACCA's severe enhanced penalties might be imposed as a consequence of the commission of prior State crimes not deemed sufficiently serious by the States themselves.[2] For example, the original definition of the crime of violence predicate offense was limited by the addition of the phrase "punishable by imprisonment for a term exceeding one year," 18 U.S.C. § 924(e)(2)(B), based on the concern that the original definition could potentially "include simply misdemeanors." S. Rep. No. 99-797, at 10 (1986) ("I would suggest that the Senator may want to consider limiting the prior convictions to those situations where the prior offense involved a crime which was punishable by a term of 1 year or more in prison; not necessarily that the person received a

---

[2] *See Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam) ("[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.") (emphasis in original).

felony sentence, but that *the offense itself was of a serious enough nature* that a felony sentence could have been imposed ....") (emphasis added).

Likewise, concerns were expressed that drug possession crimes would be swept into the definition of a serious drug offense, which led to the insertion of the language requiring that such offense "involv[e] manufacturing, distributing, or possessing with intent to manufacture or distribute." 18 U.S.C. § 924(e)(2)(A)(ii); *see* House Hearing at 26 ("The concern that is raised is that we may be picking up, by the nature of how we drafted this legislation, a person who is just simply a user rather than a distributor and that maybe we ought not to be considering that person to be a career criminal.").

In addition, in response to such concerns—at a time when the proposed legislation still covered only federal drug offenses—Deputy Assistant Attorney General James Knapp emphasized that "the Federal Government only gets involved in the most serious drug offenses, offenses involving very large quantities, we just don't apply any of those statutes to your typical user." *Id.* at 27. He additionally stated that "any reservation expressed in legislative history to the effect that we should consider as prior convictions only those convictions involving a *significant* quantity of drugs, I think, would be an appropriate reservation." *Id.* (emphasis added). This reservation necessarily applies equally to State drug offenses, further emphasizing Congress's intention to include only the most serious of offenses.

In short, the legislative history of the ACCA reinforces the importance of the text's reference to

"serious" drug offenses and clearly reveals congressional intent to impose severely enhanced federal sentences on defendants previously convicted of only "*major* State ... drug trafficking felonies." H.R. Rep. No. 99-849, at 1, 4 (1986). *Cf. Logan v. United States*, No. 06-6911, --- S. Ct. ---, 2007 WL 4232786 (Dec. 4, 2007) (referencing congressional purposes in interpreting the reach of the text Congress used to define other ACCA predicates).

B. State Recidivism Laws Reflect Judgments About Repeat Offenders, Rather Than About The Seriousness Of Underlying Offenses

The incorporation of State recidivism laws into the ACCA's definition of "serious drug offense[s]" would confound, rather than advance, the purpose of identifying the offenses deemed by the States to constitute major drug trafficking felonies. Such recidivism laws often increase the penalty for numerous offenses, even very minor offenses, and ultimately express judgments about the seriousness of repeat offending, rather than about the seriousness of the underlying offenses.

Nearly every state and the District of Columbia currently have some form of recidivism law on the books. *See generally* Wayne A. Logan, *Civil and Criminal Recidivists: Extraterritoriality in Tort and Crime*, 73 U. CIN. L. REV. 1609, 1618-20 (2005) (noting that "all states have laws enhancing the sentences of recidivist offenders" and "[t]wenty-six states have 'three strikes and you're out' laws, potentially providing for life in prison upon a third felony conviction"); *see also Parke v. Raley*, 506 U.S. 20, 26 (1992) ("Statutes that punish recidivists more

severely than first offenders . . . currently are in effect in all 50 States.") (citing DEPARTMENT OF JUSTICE, STATUTES REQUIRING THE USE OF CRIMINAL HISTORY RECORD INFORMATION, 17-41 (June 1991)). Such laws serve a number of penological purposes, as commentators, numerous State courts, and this Court have recognized. In general, the overriding purpose of these laws is to "'deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time.'" *Ewing v. California*, 538 U.S. 11, 27 (2003) (quoting *Rummel v. Estelle*, 445 U.S. 263, 284 (1980)).

Thus, many states adopted recidivism laws primarily "to deter felony offenders . . . from committing subsequent felony offenses." *State v. Wyne*, 460 S.E.2d 450, 453 n.7 (W. Va. 1995).[3] Other states cite incapacitation as the purpose of their recidivism statutes. *See, e.g.*, James A. Ardaiz, *California's Three Strikes Law: History, Expectations, Consequences*, 32 MCGEORGE L. REV. 1, 8 (2000) (explaining that framers of California law intended to identify and "isolate [habitual offenders] to eliminate repeat behavior"); *State v. Pierce*, 283 N.W.2d 6, 11 (Neb. 1979) (quoting *Ansell v. Commonwealth*, 250

---

[3] *See also, e.g.*, *State v. Freeman*, 705 N.W.2d 286, 288 (Iowa 2005); *State v. Driggs*, 745 P.2d 135, 137 (Ariz. 1987); *Montone v. State*, 521 A.2d 720, 725 (Md. 1987); *State v. Conley*, 222 N.W.2d 501, 503 (Iowa 1974).

S.E.2d 760, 761 (Va. 1979)) (noting that recidivist statutes "'protect society against habitual criminals'"), *overruled on other grounds*, *State v. Ellis*, 333 N.W.2d 391 (Neb. 1983). Incapacitation has been viewed as an increasingly important objective for recidivism laws in light of the mounting evidence suggesting that a small handful of offenders commit the vast majority of crimes. Thus, it is hoped that recidivism laws successfully targeting and isolating a core group of repeat offenders might have a significant impact on crime rates.

State legislatures crafting and revising broadly-applicable recidivism laws are not engaged in the business of evaluating the relative seriousness of various crimes. Rather, their attention is focused on habitual offenders, evaluating the penalties required to deter certain types of offenders from further crimes or determining the best means of identifying and incapacitating them. Legislators are primarily seeking not "to deter the commission of specific crimes, but to reduce crime in general" by zeroing in on these repeat offenders. Ardaiz, *supra* at 12.

Examination of State recidivism statutes themselves confirms that the primary focus often is not on the seriousness of the offense. For example, California's Three Strikes Law by its own terms does not require "that the new criminal behavior [triggering the recidivism statute] be necessarily serious or violent." *Id.* at 8. As this Court noted, the "California legislature therefore made a deliberate policy decision . . . that the gravity of the new felony should not be a determinative factor in triggering the application of the Three Strikes Law." *Ewing v. California*, 538 U.S. at 30 n.2 (internal quotation

marks omitted). Similarly, many states provide for an automatic doubling of the authorized prison term for anyone convicted of a subsequent crime under their controlled substance law. *See, e.g.*, MD. CODE ANN., CRIM. LAW, § 5-905 (West 2007); D.C. CODE § 48-904.08 (2007); 720 ILL. COMP. STAT. ANN. 570/408 (West 2007); LA. REV. STAT. ANN. § 40:982 (2007); N.J. STAT. ANN. § 24:21-29 (West 2007); WASH. REV. CODE ANN. § 69.50.408 (West 2007). This blanket doubling of all drug offenses by its nature avoids making a judgment about the seriousness of any particular drug offense.

In short, recidivism statutes primarily reflect judgments about the seriousness of repeat offending and the best means to address it, whether through deterrence or incapacitation. They do not meaningfully reflect judgments about the seriousness of particular offenses. Introducing recidivism enhancements into the calculation of the "maximum term of imprisonment prescribed by law" under the ACCA is therefore of no aid in identifying those offenses deemed most serious by States. Since recidivism laws convey no information relevant to that inquiry, they merely add noise, interfering with the purpose for which the ACCA uses the maximum term and upsetting the delicate balance created by Congress.

C. Incorporating Recidivism Laws Into The Interpretation Of "Serious Drug Offense" Would Produce Absurd Results And Place Great Burdens On Lower Federal Courts

Looking to State recidivism laws to determine the applicability of the ACCA will also necessarily lead to absurd results highly unlikely to have been intended

by Congress. It also will further complicate the work of federal district judges, who will be required in many federal sentencing proceedings to analyze intricate, diverse and often evolving state recidivism legislation.

Some state recidivism laws double, or triple, the maximum term of imprisonment for a defendant's second drug offense.[4] Because of the multiplier effect of state recidivist statutes, certain drug offenses that both the state legislature and Congress generally view as non-serious can be subject to long sentencing terms otherwise provided only for major drug trafficking offenses. In South Dakota, for example, possession with intent to deliver a Schedule III controlled substance, defined as those drugs with less potential for abuse than Schedules I and II drugs and having an approved medical use in the United States, is punishable by a maximum term of five years. S.D. CODIFIED LAWS § 22-42-3. Thus, unlawful distribution of Schedule III drugs such as codeine or herbal remedies with ephedrine by a defendant with a single

---

[4] *See, e.g.*, CONN. GEN. STAT. ANN. § 21a-277(b) (first drug offense may be punished by up to seven years; second offense by up to fifteen years); IDAHO CODE ANN. § 37-2732(a) (second time drug offender may punished for up to twice the term authorized for first time offender); 720 ILL. COMP. STAT. ANN. 570/408(a) (same); IND. CODE ANN. § 35-50-2-8 (h) (habitual offenders may punished up to three times the term authorized for first offenders); IOWA CODE ANN. § 124.411(1) (second drug offense may be punished by up to three times the term authorized for first drug offense).

prior felony conviction may be bootstrapped into an offense technically punishable by a sentence up to ten years. Especially in light of the ACCA's legislative history, it is hard to believe that Congress intended that a state crime involving the unlawful distribution of certain herbal remedies could be the predicate for the severe sentencing enhancements set out in the ACCA.[5]

Further, as this very case and other ACCA cases on the Court's docket this Term document, figuring out the precise scope and reach of recidivism enhancements presents many legal and factual challenges. Lower federal courts frequently struggle (and often reach disparate results) when forced to determine the precise reach and application of *federal* recidivism enhancements. The government's proposed interpretation of ACCA to include State recidivism provisions would mean that lower federal courts would regularly have another 50 more or more recidivism puzzles to decipher when sentencing repeat offenders. For under the government's

---

[5] In addition to serious drug offenses, violent felonies also qualify as predicate offenses under the ACCA. 18 U.S.C § 924(e). Thus a rule incorporating state recidivism enhancements arguably could apply not only to serious drug offenses but also to the definition of a violent felony "punishable by imprisonment for a term exceeding one year." *Id.* If courts incorporate state recidivism laws into the definition of a violent felony, it could permit an extraordinary array of petty State offenses to count as predicate ACCA offenses if and when committed by any person with a prior conviction.

interpretation, federal district judges would not merely have to determine if a particular defendant was *in fact* previously sentenced under a state recidivism provision, but rather would have a broader obligation to research and determine if that defendant *was possibly subject* to a state recidivism provision that could have increased his sentencing exposure for a prior drug offense to 10 years or more. The legal complications and burdensome litigation that would flow from this interpretation of the ACCA are daunting.

A number of criminal law scholars have recently discussed the extraordinary legal complications presented by the diversity of State recidivism laws. *See* Wayne A. Logan, *Horizontal Federalism in an Age of Criminal Justice Interconnectedness*, 154 U. PA. L. REV. 257 (2005); Dan Markel, *Connectedness and Its Discontents: The Difficulties of Federalism and Criminal Law*, 4 OHIO ST. J. CRIM. L. 573 (2007). Professor Logan's article details at length the "significant practical challenges and consequences," the "interpretive challenges," and the "unequal treatment" that necessarily flows from a jurisdiction's efforts to make use of a foreign jurisdiction's recidivism rules. Logan, *supra*, at 292-307.

In the context of the government's proposed ACCA interpretation, these practical challenges will be especially severe given many recent State reforms of recidivism laws. Within recent years, many States have enacted or revised its recidivism laws. *See, e.g.*, John Clark, *et al.*, *"Three Strikes and You're Out": A Review of State Legislation*, U.S. Dep't of Justice, Nat'l Inst. of Justice (Sept. 1997) (cataloguing that between 1993 and 1995, twenty-four states enacted

"three strikes" laws); Ryan King, The Sentencing Project, *Changing Direction? State Sentencing Reforms 2004-2006* (Mar. 2007), *reprinted at* 19 Fed. Sent'g Rep. 253 (2007) ("Between 2004 and 2006, at least 22 states enacted legislative reforms to their sentencing policies, or adopted policy changes affecting probation and parole revocation procedures."); Martin H. Pritikin, *Punishment, Prisons, and the Bible: Does "Old Testament Justice" Justify Our Retributive Culture?*, 28 CARDOZO L. REV. 715, 723 n.51 (2006) (noting trend toward enactment of "three strikes" laws) The government fails to explain, and perhaps even to consider, the serious constitutional and practical questions surrounding when and how changing state recidivism laws are to be assessed—*i.e.*, should evolving State recidivism laws be assessed (a) at the time of federal sentencing for the new federal offense, (b) at the time of the new federal offense, (c) at the time of the prior State sentencing for the prior State drug offense, or (d) at the time of the prior State drug offense.

POINT II

TITLE 18 U.S.C. § 924(E)(2)(A)(II) SHOULD BE INTERPRETED IN A MANNER THAT MINIMIZES THE SERIOUS CONSTITUTIONAL CONCERNS RAISED BY JUDICIAL FACT-FINDING REGARDING RECIDIVISM

The incorporation of State recidivism laws into the interpretation of "serious drug offense" should also be avoided for another reason: such incorporation would needlessly and inappropriately implicate the constitutionally questionable practice of judicial

factfinding concerning the nature and import prior State offenses.

As recognized in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the fact of a prior conviction is the only recognized exception to the general rule that "'under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact ... that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.'" Id. at 476 (quoting *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999)). This "prior conviction" exception is based on the holding in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), a ruling that has been subsequently questioned by a majority of Justices. *See, e.g., Shepard v. United States*, 544 U.S. 13, 27-28 (2005) (Thomas, J., concurring in part and concurring in judgment) (asserting that "*Almendarez-Torres* ... has been eroded by this Court's subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided") (citing *Almendarez-Torres*, 523 U.S. at 248-49 (Scalia, J., joined by Stevens, Souter, and Ginsburg, JJ., dissenting), *Apprendi*, 530 U.S. at 520-21 (Thomas, J., concurring)). *See also Rangel-Reyes v. United States*, 126 S. Ct. 2873, 2874-75 (2006) (Thomas, J., dissenting from denial of a writ of certiorari) ("[I]t has long been clear that a majority of this Court now rejects [the prior conviction] exception.").

Regardless of the continued validity and vitality of the prior conviction exception, it is clear that the government's ACCA interpretation would require

judicial fact-finding that will often have to go considerably beyond just taking judicial notice of the mere facts of a defendant's prior convictions. As Respondent's brief explains in detail, incorporating state recidivism laws into the interpretation of "serious drug offense" would require courts to engage in a particularly difficult version of such judicial factfinding concerning prior convictions. *See* Brief for Resp., Section II.A.2, pp. 27-32. Especially in light of this Court's recognition in *Shepard* of constitutional concerns raised by making finding beyond the mere fact of a prior conviction, see 544 U.S. at 18-19, this Court likewise should not impose on lower court judges a virtual obligation to engage in constitutionally questionable factfinding relating to prior convictions. *Cf.* Colleen P. Murphy, *The Use of Prior Convictions After* Apprendi, 37 U.C. DAVIS L. REV. 973 (2004) (spotlighting the broad array of *Apprendi*-implicated facts and factors that can be raised by sentencing enhancements triggered by prior convictions). Of course, the most significant constitutional concerns would be avoided by interpreting the ACCA not to incorporate State recidivism laws, and instead limiting judges to the more limited and straightforward inquiry needed to determine that a defendant committed the predicate offense and that that offense carried a particular statutory penalty. In keeping with its established practice, this Court should interpret the ACCA so as to reduce or avoid these constitutional difficulties. *See, e.g., Clark v. Martinez*, 543 U.S. 371, 381 (2005) ("[The canon of constitutional avoidance] is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not

intend the alternative which raises serious constitutional doubts.")

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

SAMUEL ESTREICHER
NYU SCHOOL OF LAW
SUPREME COURT CLINIC
40 Washington Sq. South
New York, NY 10012
(212) 998-6226

MEIR FEDER
Counsel of Record
JONES DAY
222 East 41st St.
New York, NY 10017
Tel: (212) 326-7870

DONALD B. AYER
JONES DAY
51 Louisiana Ave., NW
Washington, D.C.20001
(202) 879-4689

Counsel for Amici Curiae